

Who Will Clean Up the Gulf Oil Spill?

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On April 20, 2010, Gulf of Mexico residents awoke to news of an explosion on the *Deepwater Horizon* oil rig. The rig was on fire. Two days later, the rig sank to the floor of the seabed. Eleven crew members are missing and presumed dead.¹ Along with the tragic loss of life, untold environmental harms await as the oil begins to wash ashore. Government agencies are working together with rig owner, BP, to prevent and minimize harm to the Gulf of Mexico coastlines and fisheries. However, some exposure appears inevitable. This article examines the current regulatory framework for addressing U.S. oil spills. A second article, *Natural Resource Damage Claims under the Oil Pollution Act: A Backgrounder*, analyzes the recovery of natural resource damages resulting from the Gulf oil spill.

Background

Before sinking on April 22, the *Deepwater Horizon* oil rig was located approximately 40 miles off the coast of Louisiana in federal waters and was drilling at a depth of roughly 5,000 feet. Following the explosion, efforts to engage the emergency shutoff system (designed to minimize the amount of oil spilled) failed, allowing oil to continuously spill into Gulf waters. Initial reports estimated the leak at 1,000 barrels a day (42,000 gallons) but those estimates quickly rose to 5,000 barrels a day (210,000 gallons).²

On April 29, NOAA designated the oil spill a Spill of National Significance (SONS). A SONS is defined as "a spill that, due to its severity, size, location, actual or potential impact on the public health and welfare or the environment, or the necessary response effort, is so complex that it requires extraordinary coordination of federal, state, local, and responsible party resources to contain and clean up the discharge."³ The designation allows assets from other areas of the country, including other coastal areas, to be used to fight the spill.⁴

The *Deepwater Horizon* is owned by British Petroleum (BP) but operated by Transocean Ltd. At the time of the explosion, Halliburton was providing

cementing services on the rig as well. The specific cause of the explosion is currently unknown but both the U.S. Coast Guard and the Minerals Management Service are conducting separate federal investigations into the matter.⁵ BP, along with federal agencies, has been actively pursuing alternative measures to stop the flow of oil into the Gulf of Mexico.

As this article goes to press, the most recent estimates of the leak remain at 5,000 barrels a day with the potential of 60,000 barrels a day.⁶ Impacts to wildlife and shorelines from both the oil and the estimated 100,000 gallons of dispersant chemicals remain unclear. Federal fisheries adjacent to the oil slick areas are closed, causing a rush for local seafood across the northern Gulf of Mexico.⁷ And on May 6, the Coast Guard confirmed that oil had hit the Chandeleur Islands, just miles off the Louisiana coast.⁸

Clean Up Liability

Following the disastrous 1989 *Exxon Valdez* oil spill, Congress passed the Oil Pollution Act of 1990 (OPA) to protect public health and welfare and the environment. Along with Section 311 of the Clean Water Act (CWA), the OPA provides the primary basis for domestic oil spill regulation. The OPA provides the framework for recovering clean-up costs and also imposes liability for damage to natural resources.⁹ The CWA provides the framework for civil and criminal enforcement actions by the federal government.¹⁰ For hazardous substances other than petroleum products, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) applies.¹¹

U.S. policy prohibits the discharge of oil or hazardous substances into navigable waters and adjoining shorelines.¹² Under both the CWA and the OPA, navigable waters is broadly defined and includes waters subject to the ebb and flow of the tide, as well as wetlands adjacent to navigable waters.¹³ To fall within the scope of regulation, the discharge must be "harmful to the public health or welfare or the environment."¹⁴ Environmental harms include damage to fish, shellfish, wildlife, public and private property, shorelines, and

beaches.¹⁵ The OPA defines oil as any kind of oil “including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.”¹⁶

Under the OPA, responsible parties are strictly liable for cleanup costs and damages resulting from oil discharges. Responsible parties include the lessee or permittee of the area in which an offshore facility is located as well as owners and operators of vessels and pipelines.¹⁷ The OPA limits liability to the total of all removal costs plus \$75,000,000 per incident, an increase over the CWA § 311 levels.¹⁸

In certain circumstances, the liability limits will be lifted. For instance, limits do not apply where the incident was caused by gross negligence, willful misconduct, or violation of a federal safety, construction, or operating regulation.¹⁹ Limits will also be removed where responsible parties fail to report the incident or refuse to cooperate in removal activities.²⁰ In such situations, the government bears the burden of proof that the liability limits do not apply.

The OPA also provides affirmative defenses to liability. These defenses include an act of God, an act of war, an act or omission of a third party (other than an employee or agent of the responsible party), or any combination of the three. To assert the third party defense, the responsible party must establish that he exercised due care with respect to the oil spill and took precautions against foreseeable acts or omissions of the third party.²¹

Private Party Damages

The OPA allows private party recovery of three types of damages. First, individuals may recover damages for “injury to, or economic losses resulting from destruction of, real or personal property.”²² The second category of damages addresses losses resulting from use of natural resources.²³ The third area of private party recovery deals with damages resulting from “the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources.”²⁴ In addition, private parties may pursue other claims for damages under maritime law and state law.

Oil Spill Liability Trust Fund

Another aspect of the OPA was the creation of the Oil Spill Liability Trust Fund (Fund) and the National Pollution Funds Center (NPFC). The NPFC, an administrative agency of the U.S. Coast Guard, administers the Fund. The primary purpose of the NPFC is to “1) ensure a rapid and effective federal response to a discharge; 2)

implement and oversee a compensation mechanism, or claims process, to reimburse those damaged by discharges when the liable or responsible party cannot or does not pay; 3) establish a liability and compensation regime that serves as a deterrent to potential responsible parties; and 4) establish a mechanism through Certificates of Financial Responsibility (COFRs) to ensure that owners and operators of certain vessels have insurance in place or the funds to pay for oil spill response costs and damages up to certain limits.”²⁵

Along with funding spill response, the NPFC may adjudicate third-party claims for unreimbursed response costs and damages.²⁶ Before submitting claims to the NPFC, claims must first be submitted to, and denied by, the responsible party. Consideration by the NPFC requires the claimant produce a statement of the claim, evidence supporting how the loss occurred, and invoices documenting costs incurred by the claimant.²⁷ If NPFC denies both the claim and reconsideration of the claim, the individual may seek judicial review in an applicable federal district court under the Administrative Procedures Act.²⁸ More information on claim submission related to the *Deepwater Horizon* spill can be found on page 13.

Civil and Criminal Penalties

The federal government may assess civil penalties for unlawful discharges, failure to remove discharges, or failure to comply with an order or regulation relating to the discharge.²⁹ Penalties may go up to \$25,000 per day of violation or up to \$1,000 per barrel discharged.³⁰ For those spills caused by gross negligence or willful misconduct, the penalty shall not be less than \$100,000.³¹ In assessing penalties, the following factors are considered: 1) seriousness of the violation; 2) economic benefit to the violator, if any; 3) the degree of culpability; 4) other penalties from the incident; 5) any history of prior violations; 6) the nature, extent, and degree of success of efforts by the violator to mitigate or minimize the spill; 7) the economic impacts of the penalty on the violator; and 8) other matters required by justice.³² Civil penalties are in addition to removal costs and may be imposed regardless of fault.

In passing the OPA, Congress amended the Clean Water Act’s list of criminal violations to include negligent discharge of oil.³³ The decision to bring criminal charges by the federal government is discretionary, not mandatory. In deciding whether to pursue criminal prosecution, the government may consider factors such as prior history of the violator, the preventative measures taken, the need for deterrence, and the extent of cooperation.

Conclusion

Litigation is already underway in the Gulf of Mexico states. A variety of lawsuits have been filed since the spill with claimants ranging from commercial fisherman in Louisiana and Mississippi to condo and hotel owners in Alabama and Florida. Most lawsuits seek monetary compensation from BP for alleged losses of property or economic harms connected to the spill. While the spill has yet to make landfall, natural resource damages are also accruing. While the full ramifications of the spill cannot possibly be known at this early stage, these initial lawsuits foretell of potentially lengthy legal battles ahead. ↗

Endnotes

1. Leslie Kaufman, *Search Ends for Missing Oil Rig Workers, but Spill Seems Contained for Now*, N.Y. TIMES, April 24, 2010, at A8.
2. Campbell Robertson, *U.S. Intensifies Bid to Control Oil Spill in Gulf*, N.Y. TIMES, April 30, 2010, at A1.
3. 40 C.F.R. 300.5.
4. Robertson, *supra* note 2.
5. John M. Broder et al., *Amount of Spill Could Escalate, Company Admits*, N.Y. TIMES, May 5, 2010, at A1.
6. *Id.*
7. Kim Severson, *Fish Sells Out as Threat Creeps Closer*, N.Y. TIMES, May 7, 2010, at A18.
8. Susan Saulny, *First Katrina, Now Deepwater Horizon, a City Plays the Waiting Game Again*, N.Y. TIMES, May 7, 2010, (New Orleans Journal) at A19.
9. Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2762.
10. Clean Water Act, 33 U.S.C. § 1321.
11. 42 U.S.C. § 9601-9675.
12. 33 U.S.C. § 1321(b)(1).
13. *Id.* § 2701(21); 40 C.F.R. § 110.1; 33 C.F.R. Part 2.
14. 33 U.S.C. § 1321(b)(3)-(4).
15. *Id.* § 1321(b)(4).
16. *Id.* § 2701(23).
17. *Id.* § 2701(32).
18. *Id.* § 2704(a)
19. *Id.* § 2704(c)(1).
20. *Id.* § 2704(c)(2)
21. *Id.* § 2703(a).
22. *Id.* § 2702(b)(2)(B).
23. *Id.* § 2702(b)(2)(C).
24. *Id.* § 2702(b)(2)(E).
25. John M. Woods, *Going on Twenty Years – The Oil Pollution Act of 1990 and Claims Against the Oil Spill Liability Trust Fund*, 83 TUL. L. REV. 1323, 1324 (2009).
26. 33 U.S.C. § 2712(a).
27. 33 C.F.R. § 136.105.
28. 5 U.S.C. §§701-706; *see also* Woods, *supra* note 25, at 1325.
29. 33 U.S.C. § 1321(b)(7).
30. *Id.* § 1321(b)(7)(A).
31. *Id.* § 1321(b)(7)(D).
32. *Id.* § 1321(b)(8).
33. *Id.* § 1319(c).

